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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER, *Respondent.*

BRIEF FOR PETITIONER

THOMPSON POWERS
JANE MCGREW
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Of Counsel:

ROBERT J. ALLEN
KAISER ALUMINUM & CHEMICAL CORPORATION
300 Lakeside Drive
Oakland, California 94643

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BRIEF FOR PETITIONER

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 563 F.2d 216 (5th Cir. 1977) and may be found in the Appendix to Kaiser Aluminum & Chemical Corporation's Petition for Writ of Certiorari ("Pet. App." herein) at pages 1a-46a. The denial of Petition for Rehearing and Petition for Rehearing En Banc is reported at 571 F.2d 337 (5th Cir. 1978) and is set forth at Pet. App. 47a. The Opinion of the United States District Court for the Eastern District of Louisiana is reported at 415 F. Supp. 761 (1976) and appears at Pet. App. 48a-64a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1977 (Pet. App. 110a). A Petition for Rehearing and a Petition for Rehearing En Banc were denied on April 17, 1978 (Pet. App. 47a). After this Court granted an extension of time to file a Petition for Certiorari, the Petition was filed on September 14, 1978. The Petition was granted on December 11, 1978, and this case was consolidated with *United Steelworkers of America* v. *Weber,* No. 78-432 and *United States* v. *Weber,* No. 78-436. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Sections 703(a), 703(d), 703(h) and 703(j) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1976); Executive Order 11246, 3 C.F.R. § 339 (1964-1965 Compilation), reprinted in 42 U.S.C. § 2000e at 1232 (1976); and Revised Order No. 4, 41 C.F.R. § 60-2 (1978) are set forth in Pet. App. 66a-109a.

QUESTION PRESENTED

May an employer and a union lawfully consider race in the selection of employees for participation in a new craft training program established in part to remedy the past exclusion of blacks from craft employment?

STATEMENT OF THE CASE

Kaiser Aluminum & Chemical Corporation ("Kaiser" or "the Company") is a government contractor, subject to the affirmative action requirements of Executive Order 11246, as well as Title VII of the Civil

Rights Act of 1964, as amended. Employees at its Gramercy, Louisiana plant are represented by the United Steelworkers of America, AFL-CIO ("Steelworkers" or "the Union"), and include both unskilled workers and experienced, skilled craft workers. The Gramercy plant is one of fifteen Kaiser facilities covered by the 1974 Master Aluminum and Can and Container Labor Agreement ("Master Agreement") with the Steelworkers.

The work force in the Gramercy area was about 39 percent black when this case was tried in 1975. The Kaiser work force was 14.8 percent black at the time, up from 10 percent in 1969 when, under pressure from its federal contract compliance agency, the Company began hiring unskilled production workers on a one-to-one black-white ratio.[1] Despite vigorous recruiting efforts, before 1974 only 1.83 percent (five out of 273) of the skilled craft workers at the Gramercy plant were black.[2]

A significant factor in the near absence of blacks from the crafts was Kaiser's requirement that new hires for craft work have prior craft experience. Because blacks had long been excluded from craft unions, few were able to present such credentials.[3] Despite

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[1] Pet. App. 52a, 415 F. Supp. at 764; Pet. App. 23a-24a & n.3, 563 F.2d at 231 & n.3; Joint Appendix (hereinafter "J.A.") 60, 81-82.

[2] J.A. 167. By the time of trial, the number of craft workers had increased to approximately 290. J.A. 167. This figure was used in Kaiser's Petition for Certiorari at 3, and in Judge Wisdom's dissenting opinion. Pet. App. 24a, 563 F.2d at 228.

[3] Pet. App. 52a, 415 F. Supp. at 764; J.A. 62-63, 65, 71, 76, 93, 104.

union pressure to create craft training opportunities for unskilled production workers, Kaiser had maintained the experience requirement because of the cost of on-the-job training, estimated at $15,000 to $20,000 per trainee,[4] and its need for fully trained craft workers.[5]

In 1973, Kaiser was told by its federal contract compliance agency to eliminate the underutilization of minorities at the Gramercy plant and to assure minority representation in craft jobs at that plant by various means, including the creation of a training program.[6] At that time, Kaiser was also concerned about charges of Title VII violations at its Baton Rouge plant just north of Gramercy and about litigating a Title VII suit at its Chalmette facility to the south.[7] Concurrently, the Steelworkers were negotiating a resolution to similar charges of race and sex discrimination in the steel industry.[8] The results of the Steelworkers' negotiations were embodied in the consent decree approved in *United States* v. *Allegheny-Ludlum Industries, Inc.* which called for race- and sex-conscious selections for craft training programs.[9]

[4] J.A. 67-68.

[5] J.A. 64-65, 69-70, 75.

[6] J.A. 64, 83, 92-93. The demand for assurances of minority representation was based on requirements contained in Revised Order No. 4, Pet. App. 84a, 41 C.F.R. § 60-2 (1978). Designated federal agencies were charged with the responsibility of enforcing these requirements in various industries prior to the consolidation of this responsibility in the Department of Labor by Executive Order 12086, 43 Fed. Reg. 46501 (1978).

[7] J.A. 83. The Complaint in the suit at Chalmette was filed in federal district court in September of 1967, and the matter has been in litigation for 11 years. *See* Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978).

[8] *See* J.A. 83, 96-97.

With its own contract compliance and Title VII concerns as well as the steel industry negotiations clearly in mind,[10] the Company and the Union entered into an agreement in 1974 creating a new craft training program at the fifteen Kaiser facilities covered by the Master Agreement.[11] Although the parties expressly denied any violations of the Executive Order or Title VII they also affirmed that it was their intent "to fully comply with both the letter and the spirit" [12] of those federal laws. They further stated that the representation of minority and female employees in craft jobs "must be increased in order to assure full compliance with the standards presently being enunciated by the Government and recent court decisions." [13]

By creating this new program the Company and the Union responded to the almost total absence of blacks from craft jobs.[14] They also provided craft training opportunities to incumbent white employees, such as Respondent, who did not have experience in craft

[9] United States v. Allegheny-Ludlum Indus., Inc., Consent Decree I, Fair Empl. Prac. Manual (BNA) 431:125, 138 (1974); *see* Moore, *Steel Industry Consent Decree—A Model for the Future*, 3 Employee Rel. L.J. 214, 235 (1977).

[10] J.A. 83, 97.

[11] J.A. 131, 139. (Joint Exhibits 1 and 2.) Similar agreements were negotiated concurrently by the other major aluminum producers. J.A. 94.

[12] J.A. 139.

[13] J.A. 145.

[14] J.A. 62-64, 65-66, 71, 91-92.

work.[15] These opportunities had not previously been available to anyone.

Because of the relatively greater seniority and higher proportion of white male production workers, basing admission to the new program strictly on plant seniority would have perpetuated the underutilization of blacks and women in craft jobs[16] and thereby would have defeated the stated objective of the program. For this reason, it was agreed that, as under the Steel Consent Decree,[17] black and female employees would share the trainee vacancies equally with white male employees, based on relative seniority within each group until underutilization of blacks and women was eliminated.[18] As a result, in the first year of the program at Kaiser's Gramercy plant, six white and seven black employees were admitted to the training program.[19] No black employees would have been included among those trainees if selections had been made solely on the basis of seniority.[20]

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[15] J.A 51, 66.

[16] J.A. 71-72, 87, 91.

[17] United States v. Allegheny-Ludlum Indus., Inc., Consent Decree I, Fair Empl. Prac. Manual (BNA) 431:125, 138 (1974).

[18] J.A. 137, 144-46. For ease of reference, the term "blacks" will be used in connection with the allocation of opportunities at Gramercy although under the program women and other minorities were grouped with blacks.

[19] J.A. 66, 168.

[20] The Joint Stipulation of Facts states, with respect to the bids of all Kaiser employees for positions in the craft training program, that

> [i]n each instance, with the exception of the bids for one position as Air Conditioning Mechanic, which was restricted to white bidders only, successful black bidders were junior in seniority to one or more white bidders, who bid unsuccessfully for said position.

J.A. 128. Two black employees, W. Johnson and E. Mitchell, would have qualified for the craft training program on the basis of total plant seniority. *See* Joint Exhibit 3, J.A. 156, 160, 164. Both of these employees, however, chose not to enter the program. No other black employees were senior enough to compete successfully with white employees for admission to the program.

The Respondent is a white employee who sought admission to the new training program in 1974. He was not selected although less senior minority employees were chosen.[21] His complaint followed, alleging that the failure to admit him to the training program constituted racial discrimination against him in violation of §§ 703(a), (d) and (j) of Title VII of the Civil Rights Act of 1964, as amended.

At the trial, the Company pointed to its affirmative action obligations as a federal contractor under Executive Order 11246 and demonstrated that other efforts to meet those obligations had failed. Although Company witnesses denied any prior acts of discrimination,[22] one acknowledged that before 1969 the Company

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[21] If the sole prerequisite for selection into the training program had been plant seniority, Respondent would not have been selected. Between 35 and 40 employees bidding on the three jobs on which Weber bid had more seniority. J.A. 88. Respondent's standing to bring this suit nevertheless is not at issue. A Title VII plaintiff need not be currently suffering the effects of a challenged practice if that program will impact on him in the future. Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1188 (7th Cir.), *cert. denied,* 404 U.S. 939 (1971). Moreover, this action was brought on behalf of a class. J.A. 24. Thus, another member of the class could have been substituted for Weber even if his standing were found defective. Cox v. Babcock & Wilcox Co., 471 F.2d 13, 15-16 (4th Cir. 1972).

[22] Pet. App. 52a, 415 F. Supp. 764; J.A. 72, 77-78, 99, 108.

had selected the applicants whom it considered "best qualified" for production jobs.[23] They also conceded that the requirement of prior craft experience or training for craft applicants had a disparate impact on blacks because of their historical exclusion from craft unions.[24] No detailed justification for the disproportionately small share of Kaiser's production and craft jobs held by blacks was offered.

The District Court decided in the Respondent's favor on two grounds. First, it held that Title VII prevents employers and unions from voluntarily making employee selections based on race even if a court could require this in a litigated case or approve it in a consent decree.[25] Second, it accepted Kaiser's denial of discrimination and declared that even a court would not be authorized by Title VII to impose a race conscious remedy in the absence of a finding of discrimination against the Company. The District Court also concluded that the Company's obligations under the Executive Order must be subordinated to the specific provisions of Title VII.[26]

Kaiser and the Steelworkers appealed to the Fifth Circuit, and were joined by the United States and the Equal Employment Opportunity Commission ("EEOC") as amici.[27] The Court of Appeals rejected

[23] J.A. 78, 82.

[24] J.A. 63, 91, 93.

[25] Pet. App. 59a, 415 F. Supp. at 767-68.

[26] Pet. App. 60a-63a, 415 F. Supp. at 768-69.

[27] Pet. App. 2a, 563 F.2d at 218. Subsequently, the Government was granted the right to intervene as a party plaintiff-appellant. J.A. 175.

the District Court's holding that the scope of voluntary remedial action was more limited than that which a court could approve or impose.[28] However, in a split decision it held that, absent evidence to support a finding of prior discrimination by the Company, neither Title VII nor Executive Order 11246 would support the selection system which Kaiser and the Steelworkers had instituted in connection with the new training program.[29]

Following denial of petitions for rehearing and reconsideration en banc, petitions to this Court for a Writ of Certiorari were filed by the Company, the Union and the Government. These petitions were granted on December 11, 1978.

SUMMARY OF ARGUMENT

Title VII impels employers to eliminate or change those employment practices that adversely and disproportionately affect blacks and to increase the utilization of blacks in their work force. This Court has explicitly encouraged employer self-examination in order to produce voluntary remedial action. Such encouragement reflects both Congressional intent and the fact that attainment of the objectives of Title VII depends on voluntary action. Neither direct government supervision of the work place nor prolonged and expensive litigation is a viable alternative.

Voluntary action is not only the "preferred means" for resolving Title VII problems, but it is also expressly provided for under Executive Order 11246. Regulations issued pursuant to that Order state that

[28] Pet. App. 13a, 563 F.2d at 223.

[29] Pet. App. 14a-15a, 563 F.2d at 224.

federal contractors must eliminate underutilization of minorities and women, particularly in craft jobs from which those groups have historically been excluded.

The almost total absence of blacks from craft jobs at Kaiser's Gramercy facility posed a serious threat to the Company's contract compliance status. It also presented the clear possibility of Title VII litigation which had already embroiled two neighboring Kaiser plants and which threatened to engulf the entire steel and aluminum industries. The Company had sought to overcome the situation unsuccessfully through vigorous recruiting. Nevertheless, Kaiser's insistence on prior experience as a condition for craft work or training had produced a work force that reflected the historical exclusion of blacks from the craft unions.

The Company and the Steelworkers addressed this matter in their 1974 labor negotiations. While both parties denied liability for the situation, they agreed on a remedy in response to what they perceived to be requirements imposed by government regulations and court decisions. Their agreement took the form of a new craft training program which would enable production workers without craft experience to become craft-qualified. Although the purpose of the program was to assure that black workers would have craft opportunities, the negotiated remedy also guaranteed white production workers a 50 percent share of the trainee vacancies. In this way, the expectations of both white and black employees were significantly expanded by the 1974 agreement. Furthermore, because the craft training program was a new one, no prior expectations of white or black employees were diminished.

The Fifth Circuit majority condemned this program because of the parties' denial of liability for past discrimination and the absence of a showing that a court could have ordered such a remedy under the facts of the case. In reaching this conclusion, the court erroneously judged voluntary action by standards that are appropriate only in contested litigation. It ignored the reservoir of private authority that is fundamental to our free, pluralistic society and it misconstrued the relationship of Title VII and Executive Order 11246.

Where underutilization is present and is traceable to identified discrimination, voluntary race conscious action by employers may be required by Executive Order 11246 and is consistent with Title VII. Demanding a finding or admission of liability as a condition for approving a voluntary race conscious remedy, or restricting the benefits of that remedy to actual victims of a proven violation, would be illogical, unrealistic and counterproductive. Such a finding or admission of liability has never been required where a party chooses to enter into a consent decree, rather than to litigate to final judgment. For similar reasons it should not be required here. Otherwise, employers will face the paralyzing dilemma of choosing between waiting to be charged with discrimination against minorities or women or acting voluntarily and risking successful challenges by white males unless evidence of the employer's past discrimination is produced and not contested. Either result would add significantly to the burden on already overloaded federal agencies and would increase still further the heavy civil rights case load currently in the federal courts.

What is needed is a standard that permits an employer and union to act voluntarily within a "zone of

reasonableness": first, to make the determination that the circumstances justify the adoption of a race conscious remedy and, second, to design and implement a reasonable remedy. In this case, the presence of identified although external discrimination and the threat of legal compulsion indicate that Kaiser and the Steelworkers reasonably concluded that a race conscious remedy was needed. Additionally, the remedy was narrowly drawn to cure the problem of minority underutilization in the crafts and to do so with due regard for the interests of white employees.

This program is, in fact, a model of what can be achieved through voluntary remedial action: the melding of some of the most compelling interests of civil rights and labor management relations. As in many other kinds of situations, the Union was obliged to represent and reconcile the interests of all of its members fairly and openly. Through the collective bargaining process, the Steelworkers succeeded in obtaining the sought-after craft training opportunities for all incumbent production workers at the same time that it undertook a remedy for the obvious underutilization problem. The interests of white workers were thereby protected, indeed promoted, both in the process and in the result.

The lawfulness of the training program should not be in doubt. While it provides for racially specific selections, no other device would have enabled the parties both to provide craft training to a significant number of blacks and to utilize their seniority system to increase the opportunities for all incumbent employees. Indeed, it is programs such as this that offer the best hope of advancing that day when race conscious action

is no longer necessary to eradicate the vestiges of discrimination.

I. TITLE VII PERMITS AN EMPLOYER AND UNION WITHOUT PROOF OR ADMISSION OF LIABILITY TO ADOPT VOLUNTARILY A PROGRAM THAT PROVIDES CRAFT JOBS TO EMPLOYEES OF A CLASS PREVIOUSLY EXCLUDED BY IDENTIFIED DISCRIMINATION

A. Title VII Has Been Construed To Spur Employers And Unions To Take Race Conscious Action To Overcome The Effects Of Past Discrimination

In its first major decision under Title VII, this Court drew on precedent from civil rights voting cases [30] and unanimously declared that

> practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Griggs v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). The Court has since explained that its interpretation in *Griggs* was necessary in order that

> childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives.

McDonnell Douglas Corp. v. *Green*, 411 U.S 792, 806 (1973).

As a result of the *Griggs* rule, employers have been held to violate Title VII in circumstances which reveal

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[30] This Court has stated that the "broad language" of Title VII "frequently can be given meaning only by reference to public law concepts." Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

more about society at large than about their particular practices or motives. Where disparate impact is found employers have been held liable for restricting job opportunities because of an employee's history of garnishment,[31] arrest record,[32] participation in a methadone maintenance program,[33] or—as in this case—lack of past craft experience or training.[34] Indeed, employers and unions have abandoned or have been enjoined from using some neutral criteria, such as a high school education requirement, which were once considered to be not only useful to the employer or union but also socially desirable.[35]

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[31] Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974); Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971).

[32] Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972).

[33] Beazer v. New York City Transit Auth., 414 F. Supp. 277 (S.D.N.Y. 1976), *modified in part and aff'd in part on other grounds*, 558 F.2d 97 (2d Cir. 1977), *cert. granted*, —— U.S. ——, 98 S. Ct. 3121 (1978).

[34] Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 58-59 (5th Cir. 1974), *vacated on other grounds*, 431 U.S. 395 (1977); Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100, 1116-17 (N.D. Ga. 1976); Crockett v. Green, 388 F. Supp. 912, 918-21 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715 (7th Cir. 1976). *See also* Alvarez-Ugarte v. City of New York, 391 F. Supp. 1223 (S.D.N.Y. 1975).

[35] The high school education requirement was found to violate Title VII in the *Griggs* case and many others. *See, e.g.*, Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978); Watkins v. Scott Paper Co., 530 F.2d 1159, 1182 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976); Dozier v. Chupka, 395 F. Supp. 836, 850 (S.D. Ohio 1975). Prior to the *Griggs* decision, employers and unions were allowed by federal officials to insist on a high school education to support stay-in-school campaigns. Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Col. L. Rev. 691, 719 (1968).

The *Griggs* decision compels employers to be sensitive to the effects of their selection criteria upon minority and white candidates. Even close scrutiny of existing employment data may be inadequate because a court may find disparate impact by reference to the "potential applicant pool" [36] or simply by reference to regional [37] or national norms.[38]

Quite apart from the impact of current selection rates, employers must recognize their vulnerability to charges of discrimination under Title VII where the statistical profile of their work force reflects underutilization of certain minority groups. Though an employer is not required by Title VII to maintain a work force which is a "mirror image" of the work force in the surrounding area, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 n.20 (1977), there is an expectation that

> absent explanation . . . nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Id. Moreover, "gross statistical disparities . . . alone may . . . constitute prima facie proof of . . . discrimination," *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-08 (1977), or may bolster or restore a claim of disparate treatment. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805 & n.19 (1973).

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[36] Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

[37] Griggs v. Duke Power Co., *supra*, 401 U.S. at 430 n.6.

[38] Dothard v. Rawlinson, *supra*, 433 U.S. at 329-31; Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974); Stevenson v. Int'l Paper Co., 516 F.2d 103, 115-16 (5th Cir. 1975).

There are, of course, exemptions and other defenses to a prima facie case of discrimination which an employer may assert. For example, the underrepresentation of minorities in an employer's work force is not unlawful if the employer can show that his selection criteria have "a manifest relationship to the employment in question," *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432.[39] However, these defenses have been narrowly construed and have not yet been sufficiently defined to give many employers confidence in their ability to withstand an attack. As this Court emphasized in *Washington* v. *Davis,* 426 U.S. 229, 247 (1976), it is not enough under Title VII simply "to demonstrate some rational basis for the challenged practices." It is also essential that those practices

> be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question.

Id.

Even validation may not be enough. Plaintiffs may still "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975). Furthermore, the EEOC has continued to insist that employers must search for alternative selection devices having less

[39] In addition, this Court's opinion in *Hazelwood, supra,* 433 U.S. at 309-13, indicates that choice of appropriate statistical standards or proper time periods of liability may sometimes provide other means of rebutting a prima facie case.

discriminatory effect and substantially equal validity [40] and some courts have held that the employer's failure to make such a search is a basis for rejecting its validation defense.[41] Employers have also been chastised for persisting in efforts to establish the job-relatedness of their selection criteria which have a disparate impact [42] and, in one case, an intent to discriminate has even been inferred from such efforts.[43]

This Court's decision in the *Teamsters* case has restored the defensibility of many seniority systems that seemed lost as a result of decisions of lower courts.[44] However, the EEOC has narrowly interpreted the scope of *Teamsters,*[45] the Departments of Justice and Labor have sought to minimize its impact in cases under

[40] 43 Fed. Reg. 38290, 38297 (1978) (to be codified in 29 C.F.R. § 1607.3B).

[41] Allen v. City of Mobile, 18 Fair Empl. Prac. Cas. 217, 222-23 (S.D. Ala. 1978); Association Against Discrimination in Employment v. City of Bridgeport, 454 F. Supp. 751, 757 (D. Conn. 1978).

[42] United States v. City of Chicago, 385 F. Supp. 543, 554-55 (N.D. Ill. 1974).

[43] Dickerson v. United States Steel Corp., 17 Empl. Prac. Dec. ¶ 8528 at 6731-33 (E.D. Pa. 1978).

[44] *See, e.g.,* Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). This Court acknowledged in *Teamsters* that the prepetuation of past discrimination resulting from the operation of a seniority system would constitute a Title VII violation under Griggs v. Duke Power Co. were it not for its interpretation of the exemption in Section 703(h). 431 U.S. 324 at 349-50.

[45] *See* "EEOC Issues Interpretative Memorandum on Supreme Court's Two Seniority Decisions," 134 Daily Lab. Rep. A-7, A-8 (July 12, 1977). The full text of the EEOC Interpretative Memorandum appears at D-1 of that issue.

Executive Order 11246[46] and courts of appeals are requiring district courts to give plaintiffs broad latitude in attacking the bona fides of seniority systems if they choose to do so.[47] As a result, the likelihood that a seniority system that perpetuates past discrimination will be held to violate Title VII is diminished but not eliminated.[48]

The pressure that results from these Title VII developments is intensified for employers which, like Kaiser, are government contractors. These companies have an additional independent obligation under Executive Order 11246 to assess any "underutilization" of minorities or women in any of their job groups[49] and to act to cure that problem in the minimum feasible time.[50] Failure to take such action can result in a finding of noncompliance and, if not remedied, the issuance of a show cause order, ineligibility for future

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[46] *See, e.g.*, United States v. East Texas Motor Freight Sys., Inc., 564 F.2d 179, 184 (5th Cir. 1977).

[47] Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1192 (5th Cir. 1978); Acha v. Beame, 570 F.2d 57, 64 (2d Cir. 1978); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 351-53 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). Courts have also indicated that the lawfulness of such systems may not extend to lines of progression associated with them. Patterson v. American Tobacco Co., 586 F.2d 300, 303 (4th Cir. 1978).

[48] *See* Sears v. Atchison, Topeka & Santa Fe Ry., 454 F. Supp. 158, 180 (D. Kan. 1978); Chrapliwy v. Uniroyal, Inc., 15 Fair Empl. Prac. Cas. 822, 826 (N.D. Ind. 1977).

[49] Pet. App. 90a, 41 C.F.R. § 60-2.11 (1978).

[50] Office of Federal Contract Compliance, United States Department of Labor, "Technical Guidance Memo No. 1 on Revised Order No. 4" at 3 (Feb. 22, 1974); Affirmative Action Compliance Manual for Federal Contractors (BNA), OFCCP Compliance Manual ¶ 3-501(d) at 3:0009.

contracts, termination of contracts or debarment.[51] The availability of these sanctions means that the "inevitable thrust of affirmative action programs is to impel employers" to take race conscious action.[52]

In this still-evolving legal context, employers must be race conscious. Even if they faced only the threat of injunctive action, they would have reason to consider revising useful practices which have a disparate impact on minorities rather than endure the expense and uncertainties of litigation and the possibly greater problems resulting from an imposed remedial order. Certainly, given the encouragement of make-whole class-wide remedies,[53] the pressure for "voluntary" race conscious action is at least as compelling as this Court intended it to be when it declared in *Albemarle Paper Co.* v. *Moody, supra,* that back pay should gen-

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[51] 41 C.F.R. §§ 60-1.20, 1.24, 1.26 (1978); Executive Order No. 11246, § 209.

[52] St. Antoine, *Affirmative Action: Hypocritical Euphemism Or Noble Mandate?*, 10 Mich. J.L. Ref. 28, 34 (1976). Dean St. Antoine observed further, "Lip service is paid to the concept of nondiscrimination to the point where the conscientious employer or union must begin to feel schizophrenic, but in the end it is the 'results' that count." *Id.*

[53] Albemarle Paper Co. v. Moody, *supra,* 422 U.S. at 421. To obtain back pay, class members need only meet some minimal standards of interest and qualifications. The employer then has the burden of disproving their entitlement. International Bhd. of Teamsters v. United States, *supra,* 431 U.S. at 362. *See also* Draft Federal Contract Compliance Manual, § 7-160.2a (Oct. 1978); Statement of EEOC Chair Eleanor Holmes Norton Before House Labor Subcommittee on Employment Opportunities, 229 Daily Lab. Rep. E-1, E-8 (Nov. 28, 1978).

erally be awarded where discrimination is found in order to

> provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestige of an unfortunate and ignominious page in this country's history.

422 U.S. at 417-18 (citations omitted).

The Court's opinion in *Albemarle Paper* indicates that self-examination was intended to produce voluntary corrective action. However, it did not define the permissible scope of that action. Employers, therefore, still face the challenging task of eliminating the present effects of past discrimination against minorities and women without violating the rights of white males.[54] The inherent difficulty of this task frequently cannot be avoided by resort to subtle consideration of race and sex, as approved in some of the opinions in *Regents of the University of California* v. *Bakke*, —— U. S. ——, 98 S. Ct. 2733 (1978). While race may be used as "only one element in a range of factors" in considering applicants to a university, the flexibility

[54] In McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976), Mr. Justice Marshall reminded employers that Title VII "prohibits racial discrimination against the white petitioners in this case on the same standards as would be applicable were they Negroes." However, the issue presented in this case was preserved in *McDonald* as the Court noted that the employer did not contend that it had taken the challenged actions pursuant to an affirmative action program. "We emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted," the Court cautioned. 427 U.S. 281 n.8.

inherent in those choices is often absent from the industrial work place.

An employer's discretion is particularly limited in situations where jobs are subject to bidding and eligibility procedures established in collective bargaining agreements and in past practice. Unilateral action taken to alter existing working conditions or to establish new conditions—even under the strictest form of government compulsion—have been resisted by unions through costly and disruptive strikes [55] and litigation.[56] An employer who fails to seek union concurrence in such matters invites new problems.[57]

[55] *See* Crown Zellerbach Corp. v. Wirtz, 281 F. Supp. 337, 339-40 (D.D.C. 1968); United States v. Building & Constr. Trades Council, 271 F. Supp. 447, 449 (E.D. Mo. 1966).

[56] *See* EEOC v. AT&T, 365 F. Supp. 1105 (E.D. Pa. 1973), *aff'd in part and rev'd and remanded in part*, 506 F.2d 735 (3d Cir. 1974) where the unions' right to intervene to object to portions of a consent decree initially entered in 1971 was sustained. Their challenge was subsequently rejected in EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied sub nom.* Communications Workers of America v. EEOC, —— U.S. ——, 98 S. Ct. 3145 (1978).

[57] Moore, *Steel Industry Consent Decree—A Model for the Future*, 3 Employee Rel. L.J. 214, 235 (1977) ("Where the union is not a party to the agreement, whether it be a court order, a conciliation agreement, or other form of agreed-upon settlement, the resulting problems can be horrendous."). *See also* Southbridge Plastics Div., W.R. Grace & Co. v. Local 759, United Rubber Workers, 565 F.2d 913, 917 (5th Cir. 1978) (conciliation agreement between employer and EEOC, to which union was not a party, held not to override contradictory provisions in collective bargaining agreement; arbitration of "all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions contained in the [collective bargaining] agreement" ordered); McAleer v. AT&T, 416 F. Supp. 435 (D.D.C. 1976) (male who was entitled to promotion under collective bargaining agreement, but lost promotion to female under EEOC-AT&T conciliation agreement, to which union was not a party, held to have a cause of action against AT&T for damages).

The most stubborn barrier to subtle consideration of race and sex in many employment situations is seniority, because it is frequently the decisive factor in allocating job opportunities among equally qualified incumbent employees. Seniority leaves no middle ground for discretion: It either controls within prescribed limits or it does not; race and sex are either factored into the decision to a specified extent or they are ignored.

This aggregation of rights, obligations, interests and expectations inevitably produces conflicts among the parties concerned. There may well be disagreement as to whether any corrective action is required and if so of what form and scope it should be. Moreover, employers who do not take corrective action may be charged with violating the rights of minority workers. Those who act voluntarily may be charged with discriminating against nonminority employees. One means of resolving this dilemma is through costly and lengthy litigation.[58] If this is the only option, however, the benefits of voluntary action, which this Court so clearly contemplated in *Albemarle Paper* and other cases, will be lost.

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[58] In his dissent from the majority decision below, Judge Wisdom noted that unless that decision is reversed employers may have no alternative other than to wait to be sued or to seek a declaratory judgment. Pet. App. 27a, 563 F.2d at 230. In either event, much time and expense could be required to resolve the situation. Even where the employer's plan has EEOC approval, resolution of disputes through declaratory judgment actions may take several years. *See* Southbridge Plastics Div., W.R. Grace & Co. v. Local 759, United Rubber Workers, 565 F.2d 913 (5th Cir. 1978); Jersey Central Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded sub nom.* EEOC v. Jersey Central Power & Light Co., 425 U.S. 987 (1976).

B. Voluntary Action Is Vital To The Implementation Of Title VII And Other Federal Laws Intended To Achieve Equal Employment Opportunity

This Court has recognized that "cooperation and voluntary compliance were selected as the preferred means" for achieving the objectives of Title VII. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).[59] Voluntary compliance is more explicitly contemplated under Executive Order 11246.[60] Government contractors and subcontractors not only are prohibited from discriminating on the basis of race, religion, national origin or sex, but also are obligated to take "affirmative action" to ensure against such discrimination.[61]

There are several reasons for this emphasis on voluntary action:

(1) The nation's ultimate objective is an economy that is free from race, ethnic, sex or religious prejudice and that operates with minimal government regulation.

(2) Employers and unions are usually the most knowledgeable parties about changes in their em-

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[59] *See also* Hutchings v. United States Indus., Inc., 428 F.2d 303, 309 (5th Cir. 1970); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970); Dent v. St. Louis-San Francisco Ry., 406 F.2d 399, 402 (5th Cir. 1969), *cert. denied*, 403 U.S. 912 (1970), *rehearing denied*, 404 U.S. 875 (1971).

[60] Pet. App. 78a, Executive Order 11246, § 209(b); 41 C.F.R. §§ 60-1.20(b), 60-1.24(e)(2) (1978).

[61] Pet. App. 70a, Executive Order 11246, § 202; Pet. App. 84a-109a, Revised Order 4, 41 C.F.R. § 60.2 *et seq.* (1978).

ployment practices that need to be made and how best to make them.[62]

(3) Private parties can act voluntarily much more quickly and efficiently than is possible through orders emanating from the administrative or the judicial process.

(4) Voluntary compliance conserves administrative and judicial resources for those situations which require enforcement action.

The last two reasons—efficiency and conservation of resources—are increasingly important. Their relationship to the first reason—the realization of equal employment opportunity—is self evident: Efficient use of administrative and judicial resources is imperative if federal efforts to promote equal employment opportunity are to succeed. From the time of its establishment in 1965 the EEOC has been swamped by a rising tide of charges. It has only recently begun to reduce this problem by narrowing the focus of its investigations and by deferring further actions against systemic discrimination.[63] The Department of Labor, which is responsible for enforcing Executive Order 11246 with

[62] "Courts are generally less competent than employers to restructure business practices . . ." Furnco Constr. Corp. v. Waters, —— U.S. ——, 98 S. Ct. 2943, 2950 (1978). *Cf.* Moore, *supra*, 3 Employee Rel. L.J. at 235. *See* discussion of importance of collective bargaining in this context at 55-58 below.

[63] Statement of EEOC Chair Eleanor Holmes Norton before House Labor Subcommittee on Employment Opportunities, 229 Daily Lab. Rep. E-2, E-8 (Nov. 28, 1978); Statement of Barry Goldstein, Assistant General Counsel, NAACP Legal Defense and Educational Fund before House Labor Subcommittee on Employment Opportunities, 230 Daily Lab. Rep. E-4 (Nov. 29, 1978).

respect to approximately 275,000 supply and service contractors and 50,000 building construction contractors,[64] has been similarly shorthanded. As a result, in 1976 only about 10 percent of the contractors covered by the Executive Order were the subject of compliance reviews,[65] and enforcement proceedings against allegedly noncomplying contractors were still lagging a year later.[66]

The attention devoted to defining the affirmative action responsibilities of government contractors has also been obviously limited. Apart from the issuance and subsequent revision of Order No. 4,[67] and the release of a series of technical guidance memoranda,[68] little has been done to define those actions that nonconstruction contractors must take to comply with their obligations under the Executive Order.[69] Even

[64] The Federal Civil Rights Enforcement Effort, 1977 Report of the United States Commission on Civil Rights at 100.

[65] *Id.* at 113.

[66] *Id.* at 139-43. While the recent consolidation of Executive Order responsibilities in the Department of Labor, 43 Fed. Reg. 49240 (1978), may well improve the administration of the Executive Order, limitations of staffing will continue to force difficult choices as to priorities.

[67] Pet. App. 84a-109a, 41 C.F.R. § 60-2 *et seq.* (1978).

[68] *See, e.g.*, Office of Federal Contract Compliance, United States Department of Labor, "Technical Guidance Memo No. 1 on Revised Order No. 4" (Feb. 22, 1974).

[69] Over a year ago a Special Task Force recommended to the Secretary of Labor that demographers be employed to study availability data and to "set benchmarks for industrial job groups by labor market areas." Preliminary Report on the Revitalization of the Federal Contract Compliance Program (1977) at 78. No action has yet been announced on that recommendation. No estimate was included or has subsequently been released of the staffing or budget needed to implement this recommendation.

in the construction area where enforcement efforts were first focused, the government has been able to establish specific goals in only seven of 103 target areas.[70] Instead, it has been forced to rely on "hometown" plans that have been voluntarily developed in only thirty-five additional areas.[71]

The courts at every level are deluged by the volume of civil rights and other litigation. From 1972 to 1977 the number of employment discrimination cases filed in federal district courts increased by more than 580 percent.[72] The burden at the appellate levels is equally alarming.[73]

Administrative agencies and the courts may provide more guidance than they have in the past.[74] There is,

[70] Philadelphia, Pa.; Washington, D.C.; Atlanta, Ga.; St. Louis, Mo.; San Francisco, Ca.; Camden, N.J.; and Chicago, Ill. The Federal Civil Rights Enforcement Effort, *supra* at 127.

[71] *Id.* at 126. The Special Task Force also recommended to the Secretary of Labor in 1977 that goals for minority and female participation by construction trade be promulgated for each area in which a construction contract is to be performed.

[72] Report of the Proceedings of the Judicial Conference of the United States (1977), Table 25 at 219-20. This represents an increase from 1015 cases filed in 1972 to 5931 filed in 1977.

[73] *See* the dissenting opinion of Mr. Justice Stevens to the Court's *per curiam* opinion in Board of Trustees v. Sweeney, —— U.S. ——, 99 S. Ct. 295, 296 (1978); the dissenting opinion of Messrs. Justices White and Blackmun to the Court's denial of certiorari in Brown Transp. Corp. v. Atcon, 47 U.S.L.W. 3387 (Dec. 5, 1978) (No. 77-1581); Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 (1972).

[74] The EEOC has belatedly recognized its responsibility to issue affirmative action guidelines. 44 Fed. Reg. 4422 (1979). However, these guidelines generally leave employers and unions to decide when their situation calls for affirmative action and provide little insight into the level or extent of goals which should be included in affirmative action plans or the selection devices which are appropriate to attain those goals.

however, no reasonable prospect that the situation will improve significantly in the future. The growing awareness of and commitment to the vindication of civil rights will probably produce increasing numbers of issues and complaints as we move from a segregated economy to one that is truly integrated. Moreover, it is unrealistic to expect compliance officials or judges to assess the situation at each facility of each employer; to determine how much of present underutilization is attributable to past discrimination by the employer or union; to identify the victims of such discrimination; and to devise an appropriate set of remedial actions. Instead, employers and unions must generally be expected to analyze their own situations and to develop and implement reasonable affirmative action programs in the light of that analysis. This expectation can be realized only if the conditions which govern employer and union self-analysis and self-prescription are not self-defeating.

C. Voluntary Race Conscious Action Is Lawful Under Title VII

The Court of Appeals in this case ostensibly recognized the need for voluntary action when it reversed the trial court's ruling that employers and unions could not adopt race conscious remedial programs without judicial authorization. It expressly acknowledged that "voluntary compliance in eliminating unfair employment practices is preferable to court action and that private settlement without litigation is the central theme of Title VII."[75]

This acknowledgment is gutted, however, by the majority's additional holding that race conscious action

[75] Pet. App. 13a, 563 F.2d at 233.

is permissible only if a court could have ordered it to remedy a defendant's past discrimination. As a practical matter, this requirement will effectively suppress most voluntary race conscious action because of the difficulty of predicting judicial determinations of liability and remedy and the consequences of confessing to Title VII liability. As a legal matter, the majority's analysis is equally faulty because the range of situations in which private action is permissible is greater than the range of situations in which a court may order the parties to act. Employers and unions are free to act subject only to restraints imposed by the mandates and prohibitions of law. In contrast, a court may act only where a violation of law has occurred or is about to occur, for which the law prescribes the action as a remedy.

This contrast is stark in the context of Title VII. Although courts have "plenary powers to secure compliance" with the Act,[76] a court could not have ordered Kaiser and the Steelworkers to establish a training program to increase opportunities for minorities and women in the face of its own finding that neither of them had discriminated against those groups.[77] Nor would Title VII authorize courts to order employers or unions to abandon qualification standards that are significant measures of job performance simply to provide for proportional selection of minority or female

[76] Alexander v. Gardner-Denver Co., *supra*, 415 U.S. at 45.

[77] But note that courts have ordered the establishment of training programs to overcome the effects of past discrimination for which the employer has been found to be responsible. Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd per curiam*, 476 F.2d 1287 (5th Cir. 1973).

applicants.[78] But this conclusion does not necessarily condemn such action if it is undertaken voluntarily.

This Court has recognized the distinction between the scope of private and judicial action under Title VII and in other contexts. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1977), it observed that employers and unions may themselves go further to enhance "the seniority status of certain employees for purposes of furthering 'public policy' than Title VII would require, even when their action was "detrimental to the expectations acquired by other employees under the previous seniority agreement." 424 U.S. at 778-79. Similarly, in connection with school integration policies, Mr. Chief Justice Burger, writing for a unanimous Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), noted that as a matter of educational policy, school authorities may require "a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole" even though a federal court could not order such a remedy in the absence of a Constitutional violation.[79]

The question here is not, therefore, what a court could have done under the circumstances, but whether

[78] "Secretaries must be able to type. There is no way around that necessity." Local 189, Papermakers v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *see also* Furnco Constr. Corp. v. Waters, —— U.S. ——, 98 S. Ct. 2943 (1978).

[79] A majority of the Court approved a similar result in *Bakke*, *supra*. Although it is clear that no court could have ordered the medical school to use race as a factor in selecting students for admission in light of the facts of that case, the school's freedom to do so for policy reasons was confirmed. 98 S.Ct. at 2764.

what Kaiser and the Union did violated Title VII. Contrary to the opinion of the Fifth Circuit, the answer is "no" for two reasons: (1) Employers and unions may voluntarily take race conscious action to remedy identified discrimination without a prior finding or admission that they are liable for the discrimination; and (2) race conscious action may benefit persons who were not victims of the discrimination identified.

1. Employers And Unions May Voluntarily Take Race Conscious Action To Remedy Identified Discrimination Without A Prior Finding Or Admission Of Their Liability

Race conscious action to remedy past discrimination has been upheld repeatedly by this Court.[80] The importance and lawfulness of voluntary remedial action pursuant to Executive Order 11246 and Title VII have also been stressed.[81] However, according to the Fifth Circuit majority, Title VII precludes voluntary race conscious action by an employer and union to remedy more than their own discrimination. Asserting that a race conscious measure that exceeds those limits "loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference*," the Court of Appeals held that such a preference cannot be justified by the effects of "societal discrimination" on blacks.

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[80] This observation was made in several of the opinions in *Bakke, supra*. *See* 98 S. Ct. at 2754 (Powell, J.), 2766, 2779-81 (Brennan, White, Marshall & Blackmun, JJ., concurring in part), 2804 (Marshall, J., concurring in part), 2808 (Blackmun, J., concurring in part); *see also* United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 159-62 (1977) (White, J.), 171 (Brennan, J., concurring in part); Lau v. Nichols, 414 U.S. 563 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., *supra*, 402 U.S. at 16; McDaniel v. Barresi, 402 U.S. 39, 41 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

[81] *See* discussion, *supra* at 23-24.

This analysis suggests a degree of clarity that does not currently exist about the line between unjustifiable importation of external discrimination into the work place and business necessity. As suggested earlier, what distinguishes "unlawful" quotas to attain racial balance from "lawful" quotas to correct past discriminatory practices[82] is often only one's perception of the adequacy of an employer's or union's justification for the employment practice that produced a racial imbalance.[83] The difficulty and expense of establishing or even fully assessing such a justification may be considerable,[84] and the outcome of that process is often unpredictable before litigation.

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[82] The majority below noted that several circuits have held that "quotas or preferential treatment merely to attain racial balance of the work force are unlawful, while quotas to correct past discriminatory practices are not." Pet. App. 9a, 563 F.2d at 221 (citations omitted).

[83] *See* discussion, *supra* at 13-22.

[84] In discussing the issue of job-relatedness in Association Against Discrimination in Employment v. City of Bridgeport, 454 F. Supp. 751, 755 (D. Conn. 1978), Judge Daly stated:

> In search of an answer, the attorneys and the Court have been led by the conflicting testimony of two experts, who spoke in an alien tongue through a labyrinth of statistical analysis that might well have intimidated Odysseus.

In the decision below, Judge Wisdom observed in his dissent that

> [d]ivining the result a court would reach in any litigation is no small problem. In Title VII litigation it is particularly serious, in spite of the earnest efforts of courts, including this Court, to clarify the law. Different courts may apply the law in arguably proper distinct ways. Furthermore, decisions in these cases are fact sensitive. An employer or a union must not only be sure of the law, but must be confident of what facts will be found. Those problems afflict an employer with a single plant. Kaiser and the Union faced a more difficult situation. They were writing a national contract, covering 15 different plants. Each plant has its own area, its own history. Fifteen

Nevertheless, to say that an employer may act to correct a situation, despite questions about his liability for creating it, is not to say that he may act without cause or for purely altruistic reasons. Race conscious action should plainly be confined to situations in which it is genuinely remedial. This means that identified discrimination [85] must exist, as it did in this case.[86]

The training program challenged here was implemented in a context in which the Congress, administrative agencies and the courts have all determined "that past discrimination has handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past

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separate legal opinions would be required because, under the majority's approach, each plant will be judged on its own facts. To complicate matters further, many companies, including Kaiser, operate in several federal circuits. If the interpretation of Title VII law varies among the circuits, a national agreement is even more difficult.

Pet. App. 27a; 563 F.2d at 230.

[85] As Mr. Justice Powell recently noted in Regents of the Univ. of Cal. v. Bakke, *supra*, 98 S. Ct. at 2754-55 n.40:

> Every decision upholding the requirement of preferential hiring under the authority of Executive Order 11246 has emphasized the existence of previous discrimination as a predicate for the imposition of a preferential remedy. *Contractors Association, supra; Southern Illinois Builders Assn.* v. *Ogilvie*, 471 F.2d 680 (C.A.7 1972); *Joyce* v. *McCrane*, 320 F. Supp. 1284 (N.J. 1970); *Weiner* v. *Cuyahoga Community College District*, 19 Ohio St.2d 35, 249 N.E. 907, *cert. denied*, 396 U.S. 1004, 90 S. Ct. 554, 24 L. Ed.2d 495 (1970). See also *Rosetti Contr. Co.* v. *Brennan*, 408 F.2d 1039, 1041 (C.A.7 1975); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 490 F.2d 9 (C.A.1 1973), *cert. denied*, 416 U.S. 957, 94 S. Ct. 1971, 40 L. Ed.2d 307 (1974); *Northeast Const. Co.* v. *Romney*, 157 U.S. App. D.C. 381, 383, 390, 485 F.2d 752, 754, 761 (1973).

[86] *See* discussion at 46-49 below.

discrimination." [87] That determination was part of the basis for the federal compliance regulations with which Kaiser and the Steelworkers were trying to comply.[88] Those regulations direct the employer to remedy underutilization regardless of whether it results from the contractor's discrimination; [89] they also require him to give special attention to craft jobs in his work force analysis and goal setting [90] because minorities and women are most likely to be underutilized in those jobs. In upholding the Philadelphia Plan,[91]

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[87] Regents of the Univ. of Cal. v. Bakke, *supra*, 98 S. Ct. at 2758 n.44 (Powell, J.).

[88] The Memorandum of Understanding between Kaiser and the Steelworkers states:

> [T]he Joint Company-Union Implementation Committee has reviewed all of the existing Trade, Craft, and Assigned Maintenance classifications with respect to their representation of minority and female employees. Said review has determined that, notwithstanding the efforts made by the company and the union and/or the gains made via the company's various affirmative action plans per EO 11246, such representation must be increased in order to assure full compliance with the standards presently being enunciated by the government and recent court decisions.

J.A. 144-45.

[89] Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 175 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). The requirement to eliminate underutilization, within appropriate limits, can be based on the public interest in assuring "utilization of all segments of society and the available labor pool." EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied sub nom.* Communications Workers of America v. EEOC, 98 S. Ct. 3145 (1978).

[90] Pet. App. 90a, 41 C.F.R. § 60-2.11 (1978).

[91] Contractors Ass'n v. Secretary of Labor, *supra*, 442 F.2d at 177. The Fifth Circuit described and subscribed to the decision in *Contractors Ass'n*, but reached an inconsistent conclusion.

the Third Circuit approved such requirements and made it clear that evidence of discrimination need not be supplied by or attributed to the contractors who are directed to take race conscious action.[92]

The requirements imposed on government contractors pursuant to the Executive Order must, of course, be reconciled with the provisions of Title VII. Although the statute prevails in the case of a clear conflict,[93] such conflicts should be inferred reluctantly.[94] Congress was aware that government contractors were subject to affirmative action obligations when it enacted Title VII in 1964,[95] and, significantly, it provided in § 703(j) only that *Title VII* did not *require* actions to reduce work force imbalances. Accordingly, as the Third Circuit held in *Contractors Association,* this provision imposes no limits on the Executive Order program.[96] Moreover, Congress has rejected amendments to Title VII that would have put such a

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[92] To the same effect, *see* Associated Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972). The position of Kaiser in recruiting skilled craftsmen in Louisiana is arguably quite similar to that of some contractors trying to staff a construction project in Philadelphia. Neither is in control of the labor supply.

[93] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1951).

[94] *Id.* at 595 (Frankfurter, J., concurring).

[95] Section 709(d) of Title VII reflected Congressional awareness of the contract compliance program by providing that the reporting requirements of the Act would not apply to employers who are required to file reports under Executive Orders forbidding employment discrimination by federal contractors.

[96] 442 F.2d at 172.

restriction on affirmative action that is required under the Executive Order.[97]

The flaws in the Fifth Circuit's conclusion are also highlighted by judicial consideration of Title VII consent decrees. Many courts have entered decrees ordering employers and unions to change their em-

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[97] During Congressional consideration of the 1972 amendments to Title VII, two proposals by Senator Ervin to prohibit quotas and goals like those contemplated in Order No. 4 (and implemented in the Philadelphia Plan) were defeated by a two-to-one margin. Subcommittee on Labor of the Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 1074, 1716.

Senator Ervin explained that his first proposal would

> prevent any department, agency, or office [*sic*] of the United States from requiring an employer to practice discrimination in reverse by employing persons of a particular race or a particular national origin or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges.

Id. at 1043-44. Senator Javits responded that the amendment must be rejected because

> it would undercut the whole concept of affirmative action as developed under Executive Order 11246. . . .

Id. at 1048.

Senator Ervin's explanation of his second proposed amendment was similar to that offered for his first. *Id.* at 1713. Again, Senator Javits was the chief spokesman for the opposition, saying:

> We have held that . . . the Federal Government . . . has discretion as to whom it will contract with and will not contract with, to affirmatively encourage non-discrimination and full utilization of minority group employees and women. So we—and the courts have sustained us—permitted the Federal Government to put into effect an affirmative action plan.

Id. at 1715. Senator Javits' position on this amendment also prevailed overwhelmingly, and the Senate rejected any suggestion that Title VII should bar contract compliance agencies from requiring "fixed or variable numbers, proportions, percentages, quotas, goals or ranges."

ployment practices for the benefit of minorities and female employees without having found that the defendants acted unlawfully, and despite the denial in the decree that such discrimination occurred. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 63 F.R.D. 1 (N.D. Ala. 1974), *aff'd*, 517 F.2d 826 (5th Cir.), *cert. denied*, 425 U.S. 944 (1975);[98] *EEOC* v. *AT&T*, 419 F. Supp. 1022 (E.D. Pa. 1976), *aff'd*, 556 F.2d 167 (3d Cir. 1977), *cert. denied sub nom. Communications Workers of America* v. *EEOC*, —— U.S. ——, 98 S. Ct. 3145 (1978).

Judge Higginbotham addressed this matter directly in disposing of the contention that the *AT&T* decree went too far in subordinating seniority to the attainment of affirmative action promotion goals. He noted that denials of unlawful conduct are "a standard feature" in consent decrees, that the Supreme Court has held that "the failure of a defendant to admit liability does not affect the validity of the consent decree,"[99] and that "very few consent decrees would be negotiated if an admission of liability by the defendants was a *sine qua non*."[100] Moreover, he declared that the intervenors' attack on the *AT&T* consent decree had "arguable legal merit" only because the decree was the product of conciliation rather than litigation. Reasoning that it would surely be incongruous if the use

[98] While the majority below stated that the steel consent decree eliminated "patterns and practices of discrimination in the steel industry," Pet. App. 13a, 563 F.2d at 223, the decree does *not* contain any finding to that effect and instead includes an express denial by each of the defendants of such discrimination. Fair Empl. Prac. Manual (BNA) 431:125 (1974). For similar provisions in the *AT&T* decree *see id.* 431:73.

[99] *Citing* Swift & Co. v. United States, 276 U.S. 311, 327 (1928).

[100] 419 F. Supp. at 1038 n.16.

of a Congressionally desired means would leave the result vulnerable to attack on "the ground that the Congressional intent had been violated," Judge Higginbotham concluded that it would "frustrate the purposes of Title VII to treat the absence of evidence about AT&T's discrimination . . . and AT&T's denial of liability for such discrimination, as insuperable obstacles to the ordering of affirmative action."[101]

Courts should take at least as broad a view of the situation when voluntary affirmative action by employers and unions is challenged by those who think it violates Title VII. Employers and unions cannot be expected to concede discrimination in circumstances justifying voluntary action any more than they can be expected to admit discrimination as part of a consent decree. Nor should they be forced to invite governmental agencies or civil rights organizations to intervene and charge them with past discrimination. Indeed, such a development would present them with a Hobson's choice. If they defend their past actions successfully, their affirmative action plan may be rejected. If they fail to defend their past actions adequately, they may incur liability or at least encourage litigation and allegations of discrimination. Thus, under the Fifth Circuit's standard, "[t]he employer and the union are made to walk a high tightrope without a net beneath them."[102]

If this situation is to be avoided, employers must be given adequate leeway to take race conscious action. In deciding how much leeway to give them, courts must

[101] 419 F. Supp. at 1039-40.

[102] Pet. App. 26a, 563 F.2d at 230.

recognize that the value of voluntary action—like the value of consent decrees—will be lost if a meticulous assessment must be made of whether the remedial action being taken is precisely calibrated to any discrimination for which the employer or union might be liable. In addition to the time needed to evaluate the merits of possible defenses to underutilization, such a judgment would require tedious determinations of the injuries which occurred within remediable time periods and the amount of relief appropriate for such non-time-barred injuries.[103]

This kind of analysis usually cannot be avoided in contested litigation. It is counterproductive, however, to require it in cases that involve consent decrees or voluntary action. If employers and unions are held to the stricter standards of court-ordered remedies, voluntary action will be paralyzed. As the Fifth Circuit pointed out in *Florida Trailer & Equipment Co.* v *Deal*, 284 F.2d 567, 571 (5th Cir. 1960), parties would be hesitant to explore the likelihood of settlement if they feared that, in order to approve the agreement, the court would have to determine "that there was no escape from liability or no hope of recovery and hence no basis for a compromise." Whether or not uncertainty is conducive to the attainment of Title VII goals,

[103] Timeliness issues abound and could occupy courts and litigants indefinitely, *e.g.*, distinguishing between the effects of pre-Act and post-Act discrimination as indicated by International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), and determining the application of the appropriate period of limitations for liability and remedial purposes. *Compare* United Air Lines v. Evans, 431 U.S. 553 (1977), *with* Acha v. Beame, 531 F.2d 648 (2d Cir. 1976) *and* Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 18 Fair Empl. Prac. Cas. 45 (9th Cir. 1978).

it is a fact. Judicial recognition of this situation is essential if a realistic assessment is to be made of the permissible scope of voluntary action. It should result in the courts declaring unlawful only those measures which, under the circumstances, are clearly excessive or unreasonable.[104]

In summary, where underutilization is present and can be traced to identified discrimination, voluntary race conscious action by employers is contemplated by Executive Order 11246 and is consistent with Title VII. To condition such action on an employer's actual or assumed responsibility for the underutilization would be illogical, unrealistic, and counterproductive.

2. Race Conscious Action Need Not Be Limited To Restoring Victims Of Past Discrimination To Their Rightful Places

The Fifth Circuit majority imposed an additional limitation on the scope and even the possibility of voluntary race conscious action by holding that Title VII requires race conscious action to be limited to those who were the victims of past discrimination.[105] This limitation either ignores or misconstrues a long line of cases, including some from the Fifth Circuit itself, in which the benefits of race conscious remedies were not limited to those who were themselves victimized by the practices.[106]

[104] *See* discussion of this standard at 45-46 below.

[105] Pet. App. 16a-19a, 563 F.2d at 224-27.

[106] United States v. City of Philadelphia, 573 F.2d 802 (3d Cir. 1978), *petition for cert. filed*, 46 U.S.L.W. 3766 (U.S. June 13, 1978) (No. 77-1718); Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3780 (June 20, 1978) (No. 77-1553); EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied sub nom.* Communications Workers of America v. EEOC, —— U.S. ——, 98 S. Ct. 3145 (1978); United States v.

Title VII relief is meant not only to compensate or to make whole individuals, but also "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . white employees over other employees." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 429-30. *See also Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 783; *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 417. This "prophylactic" objective—which this Court has called "the primary objective of Title VII"—is a partner to the goal of making whole individual victims of discrimination, but it reaches beyond the person to the class. Compensation of an individual for harm he suffered does not assure persons of his race equal access to employment opportunities. Disadvantage to the group lingers long after the injury to the individual has been enjoined and paid for.

A number of courts have specifically recognized that "the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief." *Carter* v. *Gallagher,* 452

City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied sub nom.* Arado v. United States, 434 U.S. 875 (1977); United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Patterson v. Newspaper & Mail Deliverers, 514 F.2d 767 (2d Cir. 1975), *cert. denied,* 427 U.S. 911 (1976); United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 895 (1974); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973) (en banc); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied,* 406 U.S. 950 (1972); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

F.2d 315, 330 (8th Cir. 1971) (en banc), *cert. denied,* 406 U.S. 950 (1972). *Accord, Davis* v. *County of Los Angeles,* 566 F.2d 1334, 1343 (9th Cir. 1977), *cert. granted,* 46 U.S.L.W. 3780 (June 20, 1978) (No. 77-1553). Addressing this issue under the Executive Order, the Third Circuit concluded that the "broader governmental interest" in full utilization of all segments of the work force "is sufficient in itself to justify relief directed at classes rather than individual victims of discrimination." *EEOC* v. *AT&T, supra,* 556 F.2d at 175.

This Court has not yet ruled on the bounds or means of appropriate prophylactic remedies under Title VII or the Executive Order but it has never suggested that the limitation imposed by the Fifth Circuit in this case is appropriate.[107] In fact, in none of the Executive Order cases cited with approval by Mr. Justice Powell in *Bakke* were goals restricted by the concept of individual entitlement. *See, e.g., Contractors Association* v. *Secretary of Labor, supra; Southern Illinois Builders Association* v. *Ogilvie, supra; Associated General Contractors, Inc.* v. *Altshuler, supra.*[108] Those cases implicitly recognized that racial employment goals by

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[107] To prescribe the limits of individual entitlement to compensation for past discrimination, as this Court did in *Teamsters,* is not to define the scope of appropriate prophylactic action. Only Title VII remedies to individual victims of discrimination were at issue in that case. There, this Court held that even the legitimate expectations of white employees may be intruded upon to the extent necessary to make whole those individual victims. The court in *Teamsters* did not address what kinds of relief might be "necessary to ensure the full enjoyment of the rights protected by Title VII." 431 U.S. at 361.

[108] The substantial federal interest in the voluntary achievement of the goals of equal employment opportunity was articulated by the Congress in Title VII and by presidents since 1941 through

their nature are not concerned with redressing injury to individuals but with changing the composition of a work force. They reflect an awareness that overcoming conditions that operate to the disadvantage of an identifiable group or class frequently requires the presence of that group in the work force in significant numbers. Until that situation exists others may be deterred from applying or even seriously considering the possibility of doing so.[109] Race conscious selection of job candidates can achieve that result in a reasonable time period. Though difficult questions arise regarding the rate of selection of members of underutilized groups and how long such a system should continue, these problems should not obscure the fact that race conscious selections may be the only mechanism available to guarantee that the barriers to minorities have been genuinely eliminated.[110]

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the federal contract compliance program. These goals include the full utilization of minorities and women throughout the work force. It is complemented by a separate national policy objective to narrow the economic gap between white and minority and male and female workers. The affirmative action obligations of federal contractors like Kaiser have been recognized and upheld repeatedly by the courts for the additional reason explained by the Third Circuit in *Contractors Association*: The federal government has an interest in assuring that it has available the largest possible pool of qualified workers for the performance of its projects. *See* discussion of this interest in 442 F.2d at 169-71.

[109] Professor Blumrosen has analogized the minimum level of minority or female representation in a work force or job group that will produce meaningful free choice to the "take off point" in developing countries when foreign aid may be reduced or eliminated. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 Rutgers L. Rev. 465, 488 (1968).

[110] *See* NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).

This conclusion has been reached in numerous cases where race conscious action not limited to former unsuccessful applicants has been ordered to overcome substantial underutilization of minorities or women in entry level jobs.[111] The situation is no different where, as here, the jobs at stake are entry level jobs which the Company and the Union have agreed to make available for bidding by incumbent employees in order to afford them additional opportunities.[112] In these situations, as in the case of hiring, the focus should be on the reasonableness of the action[113] and on the substantial public interest being furthered by the race conscious measure at issue.

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[111] *See* cases cited note 106 *supra*. Similarly, there is no suggestion in Mr. Justice Powell's opinion in *Regents of the Univ. of Cal.* v. *Bakke*, —— U.S. ——, 98 S. Ct. 2733 (1978), that those students who may be admitted to medical school hereafter at least in part because race is "a factor" in their selection must demonstrate that they were previously the victims of discrimination. This is readily understood, since the legitimate objective sought to be achieved there—diversity of the student body—is not pegged to the harm suffered by any individual. It is an objective that exists independently and for its own sake.

[112] *Cf.* EEOC v. AT&T, *supra*. Quotas have been used in the construction industry to reorder priorities for referring workers to new assignments. United States v. Elevator Constructors Local 5, *supra;* Contractors Ass'n v. Secretary of Labor, *supra;* United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, *supra*.

[113] *See* cases cited note 106 *supra*. *See also* this Court's recent decision in United Jewish Organizations, Inc. v. Carey, *supra*, 430 U.S. at 155, where the Court held that the use of racial quotas to effect legislative reapportionment is permissible.

II. THE TRAINING PROGRAM ADOPTED BY KAISER AND THE STEELWORKERS MEETS THE APPROPRIATE STANDARDS FOR JUDGING THE LAWFULNESS OF VOLUNTARY AFFIRMATIVE ACTION

Court-ordered or -approved remedies involving racial preferences have already been carved out of the concept of unlawful discrimination.[114] Various explanations have been offered for this seeming exception to the prohibitions of Title VII, but underlying each explanation is the simple fact that it is not possible to eradicate the disparate effects of past practices on minorities without race conscious remedies.[115] This fact is equally true whether the remedy in question is entered by a court or adopted voluntarily.

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[114] *See* discussion, *supra* at 32-43.

[115] Some courts have reasoned that the prohibitions against race consciousness embodied in §§ 703(a) and 703(j) define violations, but do not limit remedies. *See, e.g.*, United States v. Elevator Constructors Local 5, 538 F.2d 1012, 1019-20 (3d Cir. 1976). Others have concluded that prohibition of remedial race conscious action would frustrate Title VII's broad prophylactic purpose and could not have been contemplated by Congress. United States v. IBEW Local 38, 428 F.2d 144, 149-50 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970). Still others have relied upon the legislative history described in note 97 *supra*. *See, e.g., Elevator Constructors, supra*, 538 F.2d at 1019-20. Finally, in his dissent below, Judge Wisdom argued that remedial race consciousness may be characterized as the drawing of distinctions based on past discriminatory status, using race as a proxy for that status. *See* Pet. App. 38a-39a; 563 F.2d at 235. Whatever the precise argument chosen, the principles underlying all of them are the same: Because "Congress did not intend to freeze an entire generation of Negro [or other protected group] employees into discriminatory patterns that existed before the act," Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968), and because reading Title VII in a "color blind" fashion would "freeze the status quo and . . . foreclose remedial action," Contractors Ass'n v. Secretary of Labor, *supra*, 442 F.2d at 173, race must be taken into account in some circumstances.

It is not enough merely to establish the need for voluntary action. Even the courts do not have unfettered discretion in framing race conscious remedies,[116] although the relevant standards have not been consistently articulated. If there is a thread running throughout the decisions, however, it is a requirement that the remedy be necessary and that neither injunctive nor compensatory relief be sufficient.[117]

In a nonlitigated situation, such a standard would be counterproductive for it would require the kind of proof that would deter voluntary action and diminish its value.[118] What is needed instead is what Judge Wisdom described as a "zone of reasonableness," that is, an area in which employers and unions can act provided that (1) their situation calls for some remedy for identified discrimination and (2) they choose a remedy adapted fairly to the circumstances.

This kind of standard is comparable to that which the courts have traditionally utilized in determining whether a collective bargaining agreement fairly adjusts the interests of different classes of employees. In *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953), for example, the Court rebuffed an attack on a revision of seniority rights among various groups of employees, saying that

> [a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete

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[116] *See* Sledge v. J.P Stevens & Co., 585 F.2d 625, 647 (4th Cir. 1978).

[117] *See id.* at 646-47; NAACP v. Allen, 493 F.2d 614, 620-21 (5th Cir. 1974).

[118] *See* discussion, *supra* at 37-39.

good faith and honesty of purpose in the exercise of its discretion.[119]

This "zone of reasonableness" standard should be utilized in answering two critical issues here: (1) Was the determination by Kaiser and the Steelworkers to take race conscious remedial action reasonable under the circumstances? and (2) Was the remedy they adopted a reasonable one? In both cases, the answer is yes. First, the parties acted reasonably given the presence of identified though external discrimination and the threat of legal compulsion. Second, the remedy was reasonably tailored to cure the problem and to do so with due regard for the interests of white employees.

A. The Company And Union Reasonably Decided To Adopt A Race Conscious Remedy Under The Circumstances Of This Case

1. The Existence Of Identified Discrimination Was Established

The *Bakke* case involved a program that depended on a generalized concept of social disadvantage inferentially linked to the small number of minority doctors. Such an "amorphous concept of injury" to minority groups was distinguished by Mr. Justice Powell from conditions present in cases such as *Contractors Association, supra,* which involved "identified discrimi-

[119] *Cf.* Humphrey v. Moore, 375 U.S. 335, 350 (1964). The Court held that, after the consolidation of the operations of two companies, the union could lawfully favor meshing the two seniority lists, even though the combined seniority system disadvantaged some union members. Mr. Justice White, writing for the Court, observed that the decision to "dovetail" the seniority lists was not "arbitrary discrimination," even though the combined seniority system disadvantaged some union members. The situation is not significantly different when a majority group member alleges that affirmative action constitutes racial discrimination against him. *See* note 145 below.

nation." In the latter situation, remedial action is lawful; in the former, it is not.[120]

There can be no doubt which situation Kaiser and the Steelworkers faced. The record in this case reveals that a history of very specific wrongs [121] had resulted in a clearly defined deprivation.[122] This, in turn, created

[120] Even the latter kind of situation does not necessarily involve identified *victims* of discrimination.

[121] The historical exclusion of blacks from the crafts is documented in many sources. *See* United States Commission on Civil Rights, The Challenge Ahead 61-94 (1976); S. Slichter, J. Healy & E. Livernash, The Impact of Collective Bargaining on Management 30-31, 37-38 (1960); H. Hill, Black Labor and The American Legal System, Vol. 1 at 235-47 (1977); W. Gould, Black Workers in White Unions 281-96 (1977); The Potomac Institute, Affirmative Action: The Unrealized Goal 97-115 (1973); F. Marshall & V. Briggs, The Negro and Apprenticeship 34-45 (1967); United States Commission on Civil Rights, Employment 127-38 (1961); 115 Cong. Rec. 40031 (1969) (Order of Arthur A. Fletcher, Assistant Secretary for Wage and Labor Standards, dated June 27, 1969, finding exclusionary practices by labor organizations in construction trades and requiring implementation of "Philadelphia Plan"); Contractors Ass'n v. Secretary of Labor, *supra,* 442 F.2d at 164 (noting findings of Assistant Secretary Fletcher in his order dated September 23, 1969, subsequent to public hearings).

[122] Testimony at the trial elaborated on the situation. J.A. 63, 90-93, 98-100. This situation was exacerbated by the Company's insistence on prior craft experience as a requirement for craft work or training and by its use of a "best qualified" standard for hiring production employees prior to 1969. The latter standard may have contributed to the disproportionately low percentage of black employees at Gramercy with pre-1969 seniority. This in turn made it impossible to secure significant numbers of minority craft trainees through selection based strictly on seniority in any reasonable time frame. *See* note 138 below. Although Kaiser utilized the best qualified standard in good faith, this defense would be "insufficient to dispel a prima facie case of systematic exclusion." Alexander v. Louisiana, 405 U.S. 625, 632 (1972), *cited in Teamsters, supra,* 431 U.S. at 342 n.24.

the underlying need for the training program. As Mr. Thomas Bowdle, Kaiser's EEO Director, testified at trial, there "has been ample evidence presented in the last six or eight years that minorities were discriminated [against], in fact, in terms of their ability to get into the building trades occupations." [123] The historical exclusion of minorities from the trade unions has been the subject of litigation and administrative proceedings time and time again.[124] In many of those cases,

[123] J.A. 104. Company witness Dennis English also explained:

> Most of the training for craftsmen over the years has come through the building trades. They have apprenticeship programs, whereby a candidate spends four or five years in an apprenticeship program, and he graduates as a skilled craftsman. Until just recently, blacks did not get into those building trades programs.

J.A. 63. Mr. Bowdle offered similar testimony. J.A. 91, 93.

[124] EEOC v. Local 14, Int'l Union of Operating Eng'rs, 553 F.2d 251 (2d Cir. 1977); United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); EEOC v. Local 638, 532 F.2d 821 (2d Cir. 1976); United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); Associated Gen. Contractors, Inc. v. Altshuler, *supra*; Sims v. Sheet Metal Workers Local 65, 489 F.2d 1023 (6th Cir. 1973); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Plumbing Indus. Local 24, 364 F. Supp. 808 (D.N.J. 1973); United States v. Local 357, IBEW, 356 F. Supp. 104 (D. Nev. 1973); United States v. Plumbers Local 73, 314 F. Supp. 160 (S.D. Ind. 1969). Administrative proceedings are referred to in Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 681 (7th Cir. 1972) (Dept. of Transportation determination); Contractors Ass'n v. Secretary of Labor, *supra*, 442 F.2d at 163-64 (Dept. of Labor hearings and determinations) and Joyce v. McCrane, 320 F. Supp. 1284, 1287 (D.N.J. 1970) (OFCC hearings).

remedial action has been directed repeatedly against the contractors whose work places are the locations where the effects of discrimination must be overcome.[125] Kaiser saw its own situation in a similar light, and considered the new training program

> to be remedial in the sense that, in our opinion, there was obviously discrimination in the past, not ours, per se, but the total sum and substance of education in training to obtain skills, that created the situation that called for a remedy such as the one we derived out of our discussions.[126]

Mr. Justice Frankfurter once observed, "there comes a point where this Court should not be ignorant as judges of what we know as men." [127] To insist, as the Fifth Circuit did here, that no evidence in this case provided a basis for remedial action is to do just that.

2. The Threat Of Legal Compulsion Was Present

Section 703(j) of Title VII specifies that nothing in the Act requires racial balancing. It does not, however, preclude race conscious action required by other federal regulations any more than it limits the scope

[125] EEOC v. Local 638, *supra* at 829-31; United States v. Masonry Contractors Ass'n, 497 F.2d 871, 877-78 (6th Cir. 1974); Associated Gen. Contractors, Inc. v. Altshuler, *supra*, 490 F.2d at 12, 19; Sims v. Sheet Metal Workers Local 65, 489 F.2d 1023, 1027 (6th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Plumbing Indus. Local 24, 364 F. Supp. 808, 831 (D.N.J. 1973); United States v. Plumbers Local 73, 314 F. Supp. 160, 166-67 (S.D. Ind. 1969); Southern Ill. Builders Ass'n v. Ogilvie, *supra*, 471 F.2d at 681, 686; Contractors Ass'n v. Secretary of Labor, *supra*, 442 F.2d at 163; Joyce v. McCrane, *supra*, 320 F. Supp. at 1288, 1291.

[126] J.A. 98.

[127] Watts v. Indiana, 338 U.S. 49, 52 (1949).

of equitable remedies under Title VII. *EEOC* v. *AT&T, supra,* 556 F.2d at 174. Kaiser, therefore, could not rely on this section to excuse it from meeting its affirmative action obligations as a federal contractor. Nor would that provision protect the Company from a prima facie case of discrimination under Title VII based on work force statistics.

Kaiser could not help but be aware of its vulnerability to suit at Gramercy. Two neighboring plants were already subject to Title VII proceedings[128] and the minority utilization statistics at Gramercy stood out as a plain invitation to litigants.[129] Its compliance agency had stated that minority representation in the crafts had to be improved, and the threat of sanctions to enforce those recommendations was obvious.[130] Under these circumstances, voluntary action may in reality be a misnomer, for legal compulsion was present as surely as if a suit had been filed or a contract lost.

[128] Kaiser was concerned about Title VII litigation directed at its Chalmette plant, Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978), and at its Baton Rouge facility. It also had in mind a Title VII suit at the neighboring Crown Zellerbach paper plant. J.A. 83.

[129] J.A. 60, 167. This Court has indicated that statistical evidence of less underutilization of blacks than was disclosed at Gramercy may be sufficient to establish a prima facie case of discrimination. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 311 n.17 (1977).

[130] J.A. 76-77, 82-83, 92-93. In contrast, a voluntary promotion quota was struck down in Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979, 1000-01, 1005-09 (E.D. Mich. 1978), where there was no evidence of underutilization or legal compulsion. Although the department, as a federal grantee, was subject to affirmative action requirements imposed by the Law Enforcement Assistance Administration, the court noted that LEAA had never so much as criticized the department's promotional policies or utilization data. The court, therefore, rejected the department's defense of legal compulsion.

B. The Training Program Adopted By The Company And The Union Provided A Reasonable Remedy

1. There Is A Direct Relationship Between The Remedy And The Problem

In approving race- or sex-conscious measures, this Court and others have generally sought to avoid overly broad remedies. A demonstrable relationship between the nature and scope of the remedy and the problem sought to be cured has usually been required.[131] Here that relationship is apparent.

While it is not possible to calibrate with precision the degree of harm with the scope of a remedy,[132] the analysis in this case is straightforward. The training program was conceived to cure a narrowly defined problem: the absence of qualified minority craft workers. The cause was identified: Minorities were unable to meet the Company's craft experience requirement because of their past exclusion from the trade unions. The consequences of Kaiser's failure to correct the underutilization problem were plain: Title VII litigation and the possible loss of federal contract eligibility.

[131] Regents of the Univ. of Cal. v. Bakke, *supra,* 98 S. Ct. at 2754, and cases cited therein. *See also* International Bhd. of Teamsters v. United States, *supra,* 431 U.S. at 368-72; Califano v. Goldfarb, 430 U.S. 199, 212-17 (1977); Weinberger v. Weisenfeld, 420 U.S. 636, 648-53 (1975); Chance v. Bd. of Examiners, 534 F.2d 993, 998 (2d Cir. 1976), *cert. denied sub nom.* Council of Supervisors v. Chance, 431 U.S. 965 (1977).

[132] *See, e.g.,* EEOC v. AT&T, *supra,* 556 F.2d at 174-80; United States v. Allegheny-Ludlum Indus., Inc., *supra,* 517 F.2d at 850, 855, 862-64.

Working from models in the Steel Industry Consent Decree and the aluminum industry,[133] the Company and Union fashioned a remedy that would provide training for craft jobs—a program that was expected to accommodate no more than twenty Gramercy employees at once.[134]

In addition, to be responsive to repeated union demands for more on-the-job craft training, the Company agreed to make all incumbent production employees eligible for the program, provided that half of the openings be reserved for blacks in order to achieve the initial purpose of the undertaking.

In relation to the objective, this new program is clearly within the zone of reasonableness. It should overcome most of the existing underutilization, but it will probably take at least thirty years to do so.[135] That

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[133] Mr. Bowdle testified that the same "approach" which Kaiser adopted in its 1974 agreement with the Steelworkers had been

> adopted in the aluminum industry, the steel industry, the can industry, and I'm sure that if you went out and investigated, you would find that there are industries, smaller, independent, or otherwise, that have arrived at the same conclusions and applied the same principles.

J.A. 94. Mr. English also acknowledged the influence of commitments in the steel industry and the paper industry. J.A. 83.

[134] J.A. 68.

[135] In 1973, there were five black craftsmen at Kaiser out of a total craft population of 273. J.A. 167. In 1974, Kaiser admitted 13 bidders, six white and seven black, into its craft training program. J.A. 166. In 1974, Kaiser also hired at least seven craftsmen off the street, only one of whom was black, thus raising its total craft population to 293. J.A. 167. If we assume that from 1974 forward Kaiser trained 20 new craftsmen every three years, J.A. 68, to make up for attrition; that the craft population of 293 remained constant; that Kaiser added an average of seven black trainees per year; and that no black craftsmen left its employ,

is certainly not an unreasonably *short* period of time.[136] The program separately allocates an appropriate share[137] of opportunities to blacks because without

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it would take 30 years for the black craft population to grow by 101 persons to a total of 114, or 39 percent of the total population of 293. The details of the calculation appear in Exhibit A. Moreover, if any black craftsmen leave Kaiser or if Kaiser continues to hire craftsmen off the street, and only one out of seven, or 14 percent, of those hired is black, as was true in 1974, then it would take longer still to reach an overall black proportion of 39 percent. The testimony of Dennis English stated that off-the-street black craftsmen were not available. J.A. 62-63.

[136] What is a reasonable period of time will vary from case to case, depending on the availability of opportunities resulting from turnover and expansion, the nature of the job qualifications and the competing equities of other employees. Some studies indicate that it may take several decades to achieve racial parity in the job market, even in the absence of overt discrimination. *See, e.g.*, Lieberson & Fuguitt, *Negro-White Occupational Differences in the Absence of Discrimination*, Am. J. Soc., Vol. 73, No. 2 (1967). The time required until affirmative action produces the desired results may seem unreasonably long in some cases, but this only emphasizes the need to encourage prompt employer action on a voluntary basis.

The situation is similar to the story President Kennedy used to tell about French Marshall Lyautey, who asked his gardener to plant a tree:

> The Gardener objected that the tree was slow growing and would not reach maturity for a hundred years. The Marshall replied, "In that case, there is no time to lose, plant it this afternoon."

Address in Berkeley at the University of California, March 23, 1962, Public Papers of the Presidents, John F. Kennedy, 1962, 263, 266.

[137] The area work force in Gramercy was 39 percent black. J.A. 60. An allocation of 50 percent of the training opportunities for black *and* female candidates is not even disproportionate in relation to availability of these groups in the local labor market. Certainly, it was reasonable in light of the distance between the level of current utilization (approximately 2 percent) and the goal, and the trainee vacancy rate of only 4 percent of craft jobs in 1974. J.A. 167.

such allocation black progress in the crafts would proceed at a glacial pace.[138] Absent race-specific selections, the program would have lost its value as affirmative action. With such selections, seven black employees obtained places in the new training program which none of them would otherwise have enjoyed.[139]

More could have been achieved for affirmative action in a shorter time if white employees had been wholly foreclosed from eligibility or afforded a smaller share of the opportunities. But such a program would have incensed union members who had pressed for training opportunities for incumbents for years.[140] The Company and the Union were sensitive to the competing interests of white males and sought a viable compromise which would nevertheless eliminate the problem of substantial underutilization of blacks and its consequences. As stated by Kaiser's witness, Mr. Bowdle, at trial, Company and Union personnel designed a program that would, in "our best judgments . . . *least disrupt the system and still achieve the goal,* other than trying to find rationales for not doing it." [141] Measured in relationship to those objectives, the program has been a success.

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[138] Much of the hiring of blacks in production jobs had occurred since 1969. Pet. App. 23a-24a & n.3, 563 F.2d at 231 & n.3; J.A. 60, 81-82. These relatively new employees would have little likelihood of being selected as craft trainees for several years. J.A. 71-72, 87. Thus, even the moderate pace of change anticipated under the Kaiser-Steelworker agreement would be slowed if not interrupted. *See* note 135 *supra.*

[139] J.A. 86-87.

[140] J.A. 73, 85.

[141] J.A. 103 (emphasis added).

2. Due Consideration Was Given To The Interests Of White Workers

In *Bakke,* the university, described as "an isolated segment" of society, was criticized for seeking to redress complex social inequities at the expense of certain racial and ethnic groups. The benign arrogance implicit in the university's judgments results from unilateral decision making in its admissions program. Unlike the university, Kaiser did not act alone in resolving the competing interests and obligations it faced. The participation of the Union in the adoption of the program provided both white and minority employees with representation committed to protecting their interests to the fullest extent feasible. The process worked well, for, like their black counterparts, white production workers at the Gramercy plant obtained craft training opportunities for the first time.[142] The fact that some of the white bidders want the benefits of the process sooner than they will be available under the agreement does not condemn the agreement.

a. Kaiser And The Steelworkers Used Their Best Judgment To Reconcile Competing Interests

Congress years ago designed a national labor policy, since confirmed by the courts, around the belief that employers and unions are in the best position to reconcile competing interests of the employer and employees.[143] Though the result may be to subordinate the

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[142] The initial selections in 1974 included six white males who would not otherwise have been eligible for in-plant training opportunities. J.A. 51, 66.

[143] *See, e.g.,* § 1 of the National Labor Relations Act of 1935, 29 U.S.C. § 151 (1976); § 201 of the Labor Management Relations Act of 1947, 29 U.S.C. § 171 (1976); Emporium Capwell Co. v.

interests of some employees to those of others, the collective bargaining process has been given deference and protection as the fairest and most workable system for assuring a proper accommodation of diverse interests.[144] The union's duty of fair representation provides additional assurance that the balance of competing equities among the employees themselves will not be unfairly distorted.[145]

This Court has held that the "elimination of discrimination and its effects is an appropriate subject of bargaining." *Emporium Capwell, supra,* 420 U.S. at 69. It has also acknowledged that judicial deference

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Western Addition Community Organization, 420 U.S. 50, 62 (1975); Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 295 (1959).

[144] *See, e.g.,* TWA v. Hardison, 432 U.S. 63, 79 (1977); Emporium Capwell Co. v. Western Addition Community Organization, *supra,* 420 U.S. at 62, 70, and cases cited therein; Humphrey v. Moore, 375 U.S. 335, 349-50 (1964). *See also* Pellicer v. Bhd. of Ry. & S.S. Clerks, 217 F.2d 205, 206 (5th Cir. 1954), *cert. denied,* 349 U.S. 912 (1955).

[145] Emporium Capwell Co. v. Western Addition Community Organization, *supra,* 420 U.S. at 64. ***But see*** Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 n.19 (1974). The statement in footnote 19 of *Gardner-Denver* that "harmony in interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made . . .", is obviously addressed to situations disfavoring those who are in the minority within the union as well as within their employer's work force. There is far less reason, if any, for suspecting the union's motives when its actions favor minority group members as they allegedly did here. In fact, the collective bargaining process has been likened to the legislative process in this regard. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944). *Cf.* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960) and J.I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944).

to the joint action of companies and unions in matters that are proper subjects of collective bargaining is generally the appropriate judicial role.[146] Other important federal policies and even individual rights may be lawfully subordinated to the process and results of collective bargaining.[147]

An employee's Title VII rights may not be violated or waived through the collective bargaining process, of course. *TWA* v. *Hardison,* 432 U.S. 63, 79 (1977); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 51 (1974). Certainly, the proposed standard of reasonableness would not preclude white members of the union from asserting their Title VII rights in this litigation any more so than in a Labor Management Relations Act context. In determining whether those rights have been violated, however, some deference is due the collectively bargained agreement whereby the Company and Union reached an accommodation of the Title VII rights and obligations of all the parties and their constituents.

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[146] *See, e.g.,* Emporium Capwell Co. v. Western Addition Community Organization, *supra,* 420 U.S. at 62, 70; *Huffman, supra,* 345 U.S. at 339-43; Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 295-97 (1959).

[147] *See, e.g.,* Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 691, 710 (1965) (agreement limiting working hours does not violate antitrust laws); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 226-27 (1977) (Stewart, J.) (upholding agency shop despite impact on employees' First Amendment rights). *Cf.* Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 622 (1975), where Mr. Justice Powell spoke of the need to reach a "proper accommodation" of national goals favoring competition and collective bargaining.

The Company and the Union have the strongest reasons and responsibilities [148] to resolve the competing interests involved in this case in an equitable manner. To approve judicial nullification of that process in the context of this case would be contrary to national labor policy and, as demonstrated above, devastating to the interests of black workers and to the nation's goal of equal employment opportunity.

b. The Program Did Not Abrogate The Rights Or Expectations Of Incumbents

Two facts about the impact of the 1974 training program on incumbent white production workers are clear: When the Company and Union adopted the training program in 1974, (1) they neither lost nor compromised any preexisting rights or expectations; and (2) for the first time, they gained an opportunity to qualify as craft workers. Before the adoption of the program, the only avenue to craft jobs for such employees would have required them to leave the Gramercy plant and to acquire experience elsewhere. The Respondent on their behalf now complains that their chance to acquire experience on the job will not come soon enough.

The legitimate expectations of employees arising out of seniority rights established under a collective bar-

[148] The union's duty of fair representation is owed to both black and white members. To meet this statutory responsibility a union is obligated to seek the most equitable accommodation of the sometimes competing interests of the two groups. *Cf.* Franks v. Bowman Transp. Co., 424 U.S. 747, 793 n.13 (Powell & Rehnquist, JJ., concurring in part); Ford Motor Co. v. Huffman, *supra*, 345 U.S. at 337-39. Certainly, there is no reason to expect that it will be unfair to those who are the majority of its membership. *See* note 145 *supra*.

gaining agreement have been shown particular solicitude by the courts.[149] Although even these expectations may be deferred or put aside for lawful purposes,[150] some courts which have upheld hiring "quotas" have struck down promotion "quotas" in deference to seniority or other interests.[151] Whether or not such an analysis is correct under Title VII,[152] it treats the incumbent employee differently than the applicant at the gate. Unlike the incumbent, the new job applicant has merely a hope, not an expectation of employment. While court-approved hiring quotas have often reserved a portion of new vacancies for nonminority candidates to avoid total foreclosure of opportunities for white males, this has generally been done in the exercise of the equitable powers of the court, not out

[149] *See, e.g.*, TWA v. Hardison, 432 U.S. 63, 79-85 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 343-57, 372-76 (1977); Franks v. Bowman Transp. Co., *supra*, 424 U.S. at 766-67; EEOC v. AT&T, 556 F.2d 167, 177 (3d Cir. 1977), *cert. denied sub nom.* Communications Workers of America v. EEOC, 98 S. Ct. 3145 (1978).

[150] *See, e.g.*, International Bhd. of Teamsters v. United States, *supra*, 431 U.S. at 372-76; Franks v. Bowman Transp. Co., *supra*, 778, and cases cited therein; EEOC v. AT&T, *supra* at 177 & n.6, *cert. denied sub nom.* Communications Workers of America v. EEOC, 98 S. Ct. 3145 (1978), and cases cited therein.

[151] *See, e.g.*, Kirkland v. New York State Dept. of Correctional Servs., 520 F.2d 420, 429-30 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340-41 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975). *See also* White v. Carolina Paperboard Corp., 564 F.2d 1073, 1091-92 (4th Cir. 1977); Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979, 1010-12 (E.D. Mich. 1978).

[152] *See* EEOC v. AT&T, *supra*, 556 F.2d at 177, *cert. denied sub nom.* Communications Workers of America v. EEOC, 98 S. Ct. 3145 (1978).

of deference to any individual's expectations of a job.[153]

The legitimate expectations of Kaiser production workers of securing craft jobs at the Gramercy plant could have been no greater than those of an inexperienced applicant at the gate. They had nothing more to lose from the adoption of the new training program in 1974 than they did from the implementation of the one-to-one black-white hiring quota at Gramercy in 1969. On the contrary, they stood only to gain.

C. Summary

Under the circumstances in this case, Kaiser and the Union acted well within the zone of reasonableness of affirmative action in adopting the challenged training program. Perhaps no one of the factors described above is indispensable, nor is any one sufficient to justify race conscious action by employers and unions. But under the conditions that existed at the Gramercy facility in 1974, in light of the law as it is and was understood, the Company and Union did not give black employees too much too soon.

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[153] *See, e.g.*, United States v. City of Chicago, 549 F.2d 415, 437 (7th Cir.), *cert. denied sub nom.* Arado v. United States, 434 U.S. 875 (1977); United States v. Elevator Constructors Local 5, 538 F.2d 1012, 1017-18 (3d Cir. 1976); Crockett v. Green, 534 F.2d 715, 718 (7th Cir. 1976); NAACP v. Allen, 493 F.2d 614, 617, 621 (5th Cir. 1974); Erie Human Relations Comm'n v. Tullio, 493 F.2d 371, 374-75 (3d Cir. 1974); Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387, 398-99 (2d Cir. 1973).

CONCLUSION

In his opinion in the *Bakke* case, Mr. Justice Blackmun wrote:

> I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where [race conscious] action . . . is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.

98 S. Ct. at 2806.

These observations could well have been made in a Title VII case for they reflect the fact that race conscious means must often now be used to achieve the ultimate goal of a work place that is free of discrimination. Although care should be taken in adopting or approving a race conscious remedy, employers and unions should not be disabled from taking such action voluntarily. Where, as here, the action was taken under compelling circumstances and safeguarded, indeed promoted, the interests of nonminorities to the fullest extent feasible, it should be upheld with confidence

that it is a "blend of what is necessary, what is fair, and what is workable." [154]

Respectfully submitted,

THOMPSON POWERS
JANE MCGREW
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

Attorneys for Kaiser Aluminum & Chemical Corporation

Of Counsel:

ROBERT J. ALLEN, JR.
KAISER ALUMINUM & CHEMICAL CORPORATION
300 Lakeside Drive
Oakland, California 94643

[154] Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (Burger, C.J.) (footnote omitted).

EXHIBIT

EXHIBIT A

Year	New Craft Trainees [1]	New Black Craft Trainees [2]	Total Black Craftsmen [3]
1974	13	7	13
1975	0	0	13
1976	7	3	16
1977	8	4	20
1978	5	3	23
1979	7	3	26
1980	8	4	30
1981	5	3	33
1982	7	3	36
1983	8	4	40
1984	5	3	43
1985	7	3	46
1986	8	4	50
1987	5	3	53
1988	7	3	56
1989	8	4	60
1990	5	3	63
1991	7	3	66
1992	8	4	70
1993	5	3	73
1994	7	3	76
1995	8	4	80

[1] Based on the maximum estimate of 20 trainees in a three-year period. J.A. 68. The Exhibit also assumes that Kaiser would only select eight trainees in 1977 to replace its graduating group of 13. Such a procedure would permit Kaiser to select five more trainees in 1978 to fill the three-year class to 20, and thus assure a system whereby some trainees might be chosen every year.

[2] Chosen on a 50-50 black-white ratio. If an uneven number of trainees enter the program in a given year, an extra black is selected one year and an extra white is selected on the next uneven year.

[3] Including six black journeymen as of 1974-1975. J.A. 71.

EXHIBIT A Continued

1996	5	3	83
1997	7	3	86
1998	8	4	90
1999	5	3	93
2000	7	3	96
2001	8	4	100
2002	5	3	103
2003	7	3	106
2004	8	4	110
2005	5	3	113
2006	7	3	116